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IN THE

Supreme Court of the United States

October Term 1967
No. 142

PACIFIC SPORTFISHING, INC., A. O. LEAVITT, and F. E. McEWEN,

Petitioners,

vs.

JUNE E. BERRY, as the personal representative of the Estate of JOHN H. BERRY, deceased.

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of the Case.

In *Burnett v. New York Central Ry. Co.* (1965) 380 U. S. 424, this Court held a Federal statutory period of limitations (there, 3 years) under a "humanitarian" Federal right-creating statute (there the FELA*) was equitably "tolled" during the pendency of an action filed in a state court, with service of process, despite the circumstance that the state court proceedings were subject to compulsory dismissal because of an incurable lack of venue (not perceived by the claimant, who apparently believed the state proceedings were good and sufficient), and had to be, and were,

*Signifying, The Federal Employers' Liability Act, 45 U.S.C. Secs. 51-59.

dismissed. It was held that the timely filing and timely processing of the state action put the defendant fully upon notice and demonstrated that the claimant was not sleeping on his rights, and thereby satisfied all of the policy considerations underlying a period of limitations; by token of this it was held a subsequently filed Federal complaint, filed promptly by the claimant on the dismissal of the state court proceedings, was timely brought though filed after the 3-year FELA statute of limitations.

The Court below applied the *Burnett* principle to hold similarly "tolled" the Federal statutory period of limitations (here, 2 years) under a like "humanitarian" Federal right-creating statute (the DHSA*) where the claimant had filed a similarly-timely state court action, with service of process, despite the circumstance that the state court proceedings were subject to a plea of exclusive Federal jurisdiction (not perceived below by either the claimant or the state court but well known to the claim-defendants, the petitioners here, who intentionally obscured and refrained from raising such issue until after expiration of the 2-year Federal limitations period for the very purpose of preventing a cure of that defect by a refiling in the Federal District Court.) The Court below held the state court, which concededly had personal jurisdiction of the parties and general jurisdiction over the tort subject matter, possessed at least "jurisdiction to determine its jurisdiction", and in the absence of a timely motion by petitioners challenging its jurisdiction, and a hearing thereon finding absence of jurisdiction, the state court had

*Signifying, The Death on the High Seas Act, 46 U. S. C. Secs. 761 et seq.

jurisdiction sufficient to toll the 2-year limitations period of the DHSA. Accordingly, the Court upheld, against a plea of the statute of limitations, an Amended Claim for wrongful death under the DHSA filed by respondent in a Federal limitation of liability proceeding instituted by petitioners below.

Very briefly, the cause at bar came about as follows. The wrongful death which is the subject of this action occurred July 13, 1962. On that date John H. Berry, the husband of respondent, was lost overboard and drowned while a passenger on petitioners' motor vessel "The Fisherman" in waters of the Pacific Ocean south of Santa Catalina Island.

On July 11, 1963 respondent instituted a timely state-court wrongful death action in the Los Angeles Superior Court, State of California. The complaint alleged the accident occurred "approximately ten (10) miles off the Eastern end of Santa Catalina Island" [R. 35*] which would, if true, vest exclusive jurisdiction in the Federal court under the DHSA, although this was not then known to or appreciated by respondent or her then counsel (not present counsel herein), a Mr. L. W. Johnston, who, as alleged in respondent's Amended Claim and admitted as on demurrer by a motion below to dismiss [R. 25-48 and 22-24] was "neither experienced in nor knowledgeable" in admiralty law. [R. 27.] Service was promptly had on petitioners.

Thereupon, as further alleged in the Amended Claim, petitioners' counsel who were "knowledgeable

*Signifying, Transcript of Record, Vol. I, p. 35. All citations to the record herein are to Volume I thereof, unless otherwise specified.

and experienced in admiralty and maritime law" and who "well knew that the action was filed in the wrong forum" [R. 27-28], filed an answer in the state court proceeding which was "intentionally [formulated by said counsel] . . . in a manner calculated to lead [respondent] and her counsel to believe that there was no jurisdictional . . . question." [R. 30.] The answer denied negligence and pleaded contributory negligence and assumption of the risk, but pled no matter "formally or informally putting [respondent] on notice that she was proceeding in the wrong forum." [R. 28.] Additionally the answer stated that petitioners "proposed" to file in the United States District Court a petition to limit their liability, although this was designedly never done until three days after elapse of the 2-year Federal limitations period.

Thereafter and on May 8, 1964 and while there yet remained two full months before the Federal limitations period ordinarily would have run under the DHSA, the state court held a pretrial hearing in the state proceedings. In those pretrial proceedings it was the duty of petitioners' counsel under Rule 210(c) of the California Rules of Court to specifically formulate and express the "legal contentions . . . as to the issues remaining in dispute" in the said proceedings. Despite this legal duty, petitioners' counsel, acting "intentionally . . . in a manner calculated to lead [respondent] and her [then] counsel [and the California court] to believe that there was no jurisdictional . . . question relating to" said state court proceedings [R. 30], filed their Separate Pretrial Statement raising again the issues of contributory negligence and assumption of the risk but making no mention of any claims of want of jurisdiction. [R. 28.]

In said pretrial proceedings petitioners again stated they intended to file limitation of liability proceedings in the United States District Court, but as above stated did not then so do.

Thereafter, although there yet then remained nine weeks before expiration of the 2-year Federal limitations period within which remedy of the state-court jurisdictional defect by the simple filing of a complaint or claim in the Federal District Court could and would have been had, as petitioners' counsel well knew, if any claim of such defect were raised on behalf of petitioners or if Federal limitation of liability proceedings were instituted and claims required to be filed therein, petitioners' counsel "deliberately" waited until exactly *three days after* the expiration of the Federal limitations period and then, and only then, on July 17, 1964, instituted below the within proceedings for limitation of liability. [R. 30.]

Thereupon petitioners obtained an order below on July 18, 1964 enjoining further proceedings in the state court action and requiring respondent to file her claim in the proceedings below. Respondent thereupon filed her claim below on October 23, 1964, and after a plea by petitioners of the statute of limitations, filed her Amended Claim below on June 4, 1965.

The Amended Claim pleaded the explanatory matters summarized above concerning the prior state court proceedings and petitioners' conduct (through counsel) therein. The District Court held the Amended Claim barred by the statute of limitations. The Court below reversed, as stated above.

ARGUMENT.

I.

There Is No Conflict Between the Decision Below and the Fifth Circuit Decision in Lillibridge v. Riley Pointed to by Petitioners.

To induce certiorari at bar petitioners point to *Lillibridge v. Riley* (C.A. 5, 1963) 316 F. 2d 232, and contend that that decision is "in direct conflict" with the decision below and that, in consequence, "it is imperative that this Court resolve the conflicts [thus] existing in the circuits." [Pet., pp. 5-6.] In fact there is no "conflict" between the two cases at all. On *three separate grounds* the decision in *Lillibridge v. Riley* is *completely distinguishable* from the case at bar and creates no "conflict" therewith whatever.

(1) In the first place the *Lillibridge* decision involved *solely* issues of *state law;* the cause at bar, to the contrary, presents issues exclusively of *Federal law.* Thus there is and can be *no* conflict.

The *Lillibridge* case, which arose in Georgia, was in the Federal courts only because of diversity of citizenship. Involved there was the state-law question of whether a Georgia state "tolling" statute (Georgia Code, Sec. 3-800) would, on the facts there presented, toll the running of the applicable Georgia state statute of limitations (Ga. Code, Sec. 3-1004). The Court of Appeals for the Fifth Circuit, following *Georgia* decisional law interpreting the two state statutes* held

*The Court of Appeals in the *Lillibridge* decision relied upon as controlling the Georgia decisions in *Brinson v. Kramer,* 72 Ga. App. 63, 33 S. E. 2d 41; *Cutliffe v. Pryse,* 187 Ga. 51, 200 S. E. 124, and other like decisions collected at 316 F. 2d at p. 233.

the tolling statute did not apply and that the state limitations statute had therefore run.

It is settled by the decisions of this Court that in diversity cases, by force of the rule in *Erie Ry. Co. v. Tompkins* (1938) 304 U. S. 64, the issue of the applicable statute of limitations period is governed and determined by *state law* (*Guaranty Trust Co. v. York* (1945) 326 U. S. 99) and, of course, where state law thus controls, state judicial decisions expressing that law or construing relevant state statutory provisions expressing such are *binding* on the Federal courts. (*Nolan v. Transocean Airlines* (1961) 365 U.S. 293, 294-295; *Fidelity Trust Co. v. Field* (1940) 311 U. S. 169, 177; *Erie Ry. Co. v. Tompkins, supra,* 304 U. S. at p. 78.)

The case at bar, on the other hand, involved *Federal* rights and law and was determined below upon the basis of *Burnett v. New York Central Ry. Co., supra,* and the *Federal* equitable "tolling" principle expressed in that decision and applicable to Federal statutory periods of limitation under tenets of Federal judicial policy and as a principle of construction applicable at least to "humanitarian" Federal right-creating statutes, such as the FELA (as in *Burnett*) and the DHSA (as at bar). Thus the two decisions in no way conflict.

(2) Moreover, the *Lillibridge* decision in addition to being addressed to state and not Federal law, failed to raise or consider the possible influence (even on state law) of the *Burnett* case principle of the equitable tolling of a statute of limitations because of a timely filing in good faith, with service of process, of colorable proceedings in another forum even if those proceedings be ultimately found defective and be ordered dis-

missed. Even leaving aside the decisive difference between diversity cases and Federal-law decisions, *Lillibridge* in any event can scarcely raise a "conflict" as to the applicability of the *Burnett* equitable tolling principle upon given facts where such issue was neither raised nor in any manner considered.

(3) Finally, the decision below held the *Burnett* principle applicable to equitably toll the statute of limitations of the DHSA for the period of first-filed state court proceedings until these were superseded by Federal proceedings, even though it should be assumed that the state court lacked ultimate jurisdiction because the death occurred beyond a maritime league from shore, upon the reasoning that the state court at least had "jurisdiction to determine jurisdiction" and such was sufficient to permit a good faith first-filing in such court to toll the limitations period. Since the *Lillibridge* decision did not reach or consider the *Burnett* case principle proper, by like token it failed to consider in any way the propriety of the rule below that "jurisdiction to determine jurisdiction" is sufficient to support the equitable tolling principle of *Burnett* where the same is otherwise applicable in every way.

In consequence, again, the *Lillibridge* case can create no "conflict" with the decision below because it fails to address truly the issues tendered and determined below.

II.

The Decision Below Accords With and Is Fully Sustained by Burnett v. New York Central Railroad Co. and Subsequent Decisions Approving and Following the Same.

The case below relied upon and is fully sustained by the precedent of *Burnett v. New York Central Railroad Co., supra.*

In *Burnett,* as heretofore stated, a state court proceeding was held to toll the Federal FELA statute of limitations notwithstanding that the state court proceedings were subject to an *incurable* defect of venue and, in consequence, were powerless to proceed either to trial or judgment and were required to be, and were, dismissed. Despite these defects, because the state court proceedings fully satisfied the policy considerations supporting a statute of limitations by putting the claim-defendant on full notice and by demonstrating the claimant was not sleeping upon his rights, this Court held the three-year statute of limitations under the FELA was equitably "tolled", and that a Federal action, filed promptly after the dismissal of the state court proceedings but after the three-year ordinary limitations period, was not time barred.

Petitioners seek to discount the *Burnett* decision at bar because, they say, at bar the state court proceedings were vulnerable to a plea of exclusive Federal jurisdiction, whereas the defect in the state court proceedings in *Burnett* was as to venue, not "jurisdiction". But in *Burnett* the venue defect was *incurable,* because *no*

state court in the state there concerned (Ohio) had proper venue, hence transfer was *impossible* and the proceedings on proper motion had to be, and were, *dismissed.* Despite those circumstances this Court held the state court proceedings there had sufficient color to toll the Federal limitations period in view of the fact that there had been service of process and the defendant had been put upon full notice to defend and had been apprised by a colorable legal complaint of the claimant's legal claim. Such circumstances, said the Court, demonstrated that the claimant there had "failed to file an FELA action in the federal courts, not because he was disinterested, but solely because he felt that his state action was sufficient" (380 U. S. at p. 429), and the claim-defendant could not urge any injury "for it was aware that [the claimant] was actively pursuing his FELA remedy" and "in fact" had appeared in the state proceedings "to file a motion for dismissal on grounds of improper venue." (380 U. S. at p. 429.)

So, too, at bar.

Additionally, applicability at bar of the principle of the *Burnett* case is confirmed further by the subsequent decision of this Court in *Honda v. Clark* (1967) U. S. , 18 L. Ed. 2d 244. There a sixty-day statute of limitations period under the Trading With The Enemy Act, 50 USC App. Sec. 34(f), was held "equitabl[y] toll[ed]" under the *Burnett* principle upon facts significantly comparable to the

facts at bar. In *Honda* several thousand American citizens of Japanese descent held claims against the Alien Property Custodian for bank deposits made in United States branches of Japanese banks which had been seized by the United States during World War II. All of these claimants shared in common the legal question of whether their deposits were redeemable at dollar value or only at post-war yen value, which was far, far lower. Of these claimants one class or group was composed of those who had taken certain administrative steps and been frustrated therein; a second class was composed of the remainder of the claimants, being those who had not even taken these preliminary administrative steps, although they had made proper administrative applications for payment of their claims.

One Kunio Abe brought a class action against the United States Government on behalf of the first class of claimants above described for declaratory relief to establish that the pre-war bank deposits were recoverable at dollar value. This litigation lasted from 1961 through 1964 and resulted ultimately in a decision upholding recovery by those claimants at full dollar value. Thereafter the claimants in the second class above described sought payment at dollar value and were refused, and thereafter brought suit in the Federal District Court.

Although the claimants in the second class (those who did not take the particular administrative step above mentioned) were *not* in law parties (even by

representation) to the above described class action for declaratory relief, in fact their claims depended at all times upon the legal resolution of the issue of dollar value versus yen value as all parties concerned well knew; additionally, the claimants in the second class by force of various equitable considerations were not blameworthy in not realizing that their rights were not being time-protected during the period of this 1961-1964 declaratory-relief class-action litigation. In these premises, the Government being fully informed and being completely uninjured by the delay because interested only as a stake-holder, this Court held the limitations period was tolled as to the second class of claimants as well as to the first class, notwithstanding this Court's express recognition that the complaint in the class action for declaratory relief "legally excluded" the second class in its definition of the parties represented. (18 L. Ed. 2d at p. 254.)

Thus in *Honda* the *Burnett* principle was applied even though the prior, defective proceedings concerned there did not include the claimants in *Honda* as *legal parties.* Surely want of "jurisdiction" in the sense involved at bar is no more serious a deficiency in prior proceedings relied upon to toll the limitations period than a total *absence of personal jurisdiction* which, in essence is the simple, true import of the absence of "personal representation" of the second class of claimants in *Honda* in the prior proceedings there concerned.

III.

The Decision Below Is Supported Further by Contempt Precedents of This Court Upholding "Jurisdiction to Determine Jurisdiction.".

This Court has long maintained the principle that a court with personal jurisdiction of the parties and with general jurisdiction of the subject matter possesses "jurisdiction" sufficient to vindicate its authority and to punish by contempt any person disobeying its orders even if on later review it is determined that the court truly possessed "no jurisdiction to entertain" the cause in the original (*United States v. Shipp* (1906) 203 U. S. 563, 573) or no "jurisdiction" under the Norris-LaGuardia Act to issue the injunctive order disobeyed (*United States v. United Mine Workers* (1947) 330 U. S. 258, 290) or had grounded its injunctive command upon "a seeming but void law." (*Howat v. Kansas* (1922) 258 U. S. 181, 190.)

This is the doctrine of "jurisdiction to determine jurisdiction." As this Court has expressed it, "Pending a decision on a doubtful question of jurisdiction, [a court of first instance has] power to maintain the *status quo* and punish violations as contempt. . . . In [such a case, such a court has] the power to preserve evisting conditions while it [is] determining its own authority to [further proceed]." *United States v. United Mine Workers, supra,* 330 U. S. at pp. 292-293.)

Recently this Court reaffirmed the foregoing principle as applicable and controlling even with respect to a

state court's injunctive order claimed to exceed jurisdiction because violating (and by this Court for purposes of the case assumed to have indeed violated) the highly-protected Federal Constitutional rights of freedom of speech, petition and assembly, and, related thereto, the Federal supremacy clause. (*Walker v. City of Birmingham* (1967) U. S. , 18 L. Ed. 2d 1210.)

Stressed particularly by this Court in the *Walker* decision was the circumstance (present and stressed also in the *United Mine Workers* decision, *supra,* 330 U. S. at p. 290) that the defendants there concerned made no effort to raise the issues of claimed unconstitutionality at the bar of the state court authorizing the injunction prior to committing the claimed acts of contempt, and "g[ave] absolutely no explanation of why they did not make [such an] application to the state court during that period." (*Walker v. Birmingham, supra,* 18 L. Ed. 2d at p. 1218.)

These principles apply also at bar. If a court lacking ultimate jurisdiction yet has "jurisdiction to determine jurisdiction", and if, in consequence, such court, in the interim period between the filing with it and an ultimate determination of no jurisdiction either by it or by a higher court on appeal, has sufficient color of authority to punish for contempt one violating its orders, then it would seem reasonably to follow such a court would also have sufficient color of authority for purposes of the *Burnett* principle to permit a filing with it in good faith, under its apparent jurisdiction and with service of process, to equitably toll a statutory period of limitations. Jurisdiction sufficient for contempt should be sufficient as well for a colorable filing adequate to toll the statute of limitations.

Moreover, as is stressed re the issue of contempt in the *Walker* and *United Mine Workers* cases, a failure to raise the contention of want of jurisdiction *at the original time* and *in the original court* underscores the justness and appropriateness of imposing the consequence of a bar against raising such claim in the later proceedings. At bar there was also such a failure by the petitioners and at bar the failure was equally without mitigating explanation.

Conclusion.

Wherefore, for all of the reasons and upon all of the considerations set forth above, respondent respectfully submits the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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